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Abu Bakar bin Pangis & Ors v Tung Cheong Sawmill Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–237–05 OF 2012
ABDUL WAHAB PATAIL, MOHTARUDIN BAKI AND MAH WENG KWAI JJCA
17 APRIL 2014

Civil Procedure — Appeal — Assessment of evidence — Trial court held claims to native customary rights ('NCR') over lands not proven on balance of probabilities — NCR claims based on ancestral occupation — Whether trial court wrong to have rejected claimants' evidence for not being based on personal knowledge — Whether discrepancies and uncertainties inherent in such claims — Whether discretion to invoke adverse inference should be judicially exercised — Whether claimants' testimonies largely unrebutted and claims accorded with law and not lacking in veracity or bona fides — Whether respondents' defence inconclusive on facts and unfounded on law

The appellants, both on their own behalf and on behalf of 240 others, sued the second and third respondents in the High Court for infringing their native customary rights ('NCR') over two tracts of land ('the lands') as a result of the granting of provisional leases over those lands to the first respondent. The appellants claimed they had a legitimate expectation that the lands would be given to them under s 18 of the Sarawak Land Code in recognition of their subsisting NCR and, consequently, the alienation of the lands to the first respondent was void and also unconstitutional for breaching art 5(1) of the Federal Constitution. The appellants contended that they inherited their NCR to the lands from their ancestors who came into occupation of them in the early 1900s. The respondents denied the claims contending that the provisional leases were issued in accordance with the law as checks made by the relevant departments prior to the issue did not show any valid NCR claims to the lands had been made by any of the appellants. The High Court dismissed the suits holding that the appellants had failed to prove their claims on a balance of probabilities. It was contended in the instant appeal against that decision that the trial court had made several perverse findings of facts on the available evidence and that the court had misdirected itself in law.

Held, allowing the appeals, setting aside the High Court's decision and ordering, inter alia, the second and third respondents to pay damages, as assessed by the deputy registrar, to the appellants:

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(1) The appellants had successfully proven their cases on a balance of probabilities. The second and third respondents, on the other hand, failed to establish their defence on law. The defence was not conclusive on the facts and unfounded on the law (see paras 104, 94 & 91).

(2) Given that the claims were based upon occupation in 1909 or 1910, with no direct witnesses alive to testify for the appellants, it was unrealistic to expect complete, crystal-clear and precise evidence as in mathematical or scientific proof. The discrepancies and uncertainties in the appellants' evidence were inherent in NCR claims based upon ancestral occupation. There was no reason demonstrated by the evidence or brought out in cross-examination that the appellants' claims were not in accordance with law or that their facts and evidence were not bona fide or that they were untrue. Even the government of the state and its departments charged with jurisdiction over forests and land had no precise evidence either. The timber licence and provisional leases issued were subject to survey, implicitly acknowledging that the areas issued could be the subject of adverse claims (see para 104).

(3) There was nothing in the law that disallowed the acquisition of NCR by the appellants' ancestors in 1909 or 1910 to land occupied, cleared and cultivated as well as set aside under the native custom of 'pulau ramu'. On studying the examination, cross-examination and re-examination of the witnesses, this court concluded that it was the failure to clarify which part was maintained as 'pulau ramu' and which part was cleared, cultivated and planted with trees that was the cause of the discrepancy, made worse by the fact the forest had been logged and the case depended on memories of what the appellants had been told and not from any inherent unreliability or untruthfulness on their part which warranted their testimony to be rejected. The trial court itself did not find them to be untruthful witnesses. Other parts of their testimonies were consistent and, although containing some discrepancies, were not contradicted. The defence's approach was only to challenge the appellants to produce evidence and then to try to discredit it (see paras 77, 102 & 103).

(4) The High Court failed to appreciate the facts of the case and erred in rejecting the appellants' evidence, resulting in the conclusion that they had failed to prove their NCR claims. In considering NCR claims, where rights were established in the distant past without ready records, a realistic approach had to recognise that there was more likely than not very little hard evidence and much depended upon the oral history the claimants and their elders could relate from fragile memories. The approach of 'since evidence was not adduced, therefore adverse inference will be drawn' was more likely to lead to injustice. The reasons for the failure must be examined to determine whether discretion ought to be

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exercised to draw an adverse inference, and if the reasons were not before the court, no adverse inference ought to be raised (see paras 71 & 60).

(5) The realistic approach was to evaluate and appreciate the facts based upon the evidence that was before the court and not embark upon drawing adverse inferences and conclusions on evidence not presented or on speculation. In cases such as these, inability to present evidence was not necessarily because there was no evidence or that the fact was to the contrary. It might simply be because the evidence did not exist. The discretion to draw an adverse inference must be judicially exercised. It could be drawn if it was shown that the evidence was available but was not produced (see s 114 Evidence Act 1950) (see paras 61–62).

[Bahasa Malaysia summary

Perayu-perayu, kedua-duanya bagi pihak mereka dan bagi pihak 24- yang lain, telah menyaman responden-responden kedua dan ketiga di Mahkamah Tinggi kerana melanggar hak-hak adat anak negeri mereka ('HAAN') ke atas dua kawsan tanah ('tanah tersebut') akibat daripada pemberian pajakan-pajakan sementara ke atas tanah tersebut kepada responden pertama. Perayu-perayu mendakwa mereka mempunyai jangkaan yang sah bahawa tanah tersebut akan diberikan kepada mereka di bawah s 18 Kanun Tanah Sarawak sebagai pengiktirafan mereka menggantikan HAAN dan, berikutan itu, pemberian hak milik tanah tersebut kepada responden pertama adalah tidak sah dan juga tidak berperlembagaan kerana melanggar perkara 5(1) Perlembagaan Persekutuan. Perayu-perayu berhujah bahawa mereka mewarisi HAAN tanah tersebut daripada nenek moyang mereka yang menduduki tanah tersebut pada awal tahun 1900an. Responden-responden menafikan tuntutan-tuntutan itu dengan berhujah bahawa pajakan-pajakan sementara itu telah dikeluarkan menurut undang-undang kerana pemeriksaan yang dibuat oleh jabatan-jabatan berkaitan sebelum keluaran itu tidak menunjukkan apa-apa tuntutan HAAN yang sah ke atas tanah tersebut yang telah dibuat oleh mana-mana perayu. Mahkamah Tinggi telah menolak guaman-guaman itu dengan memutuskan bahawa perayu-perayu telah gagal untuk membuktikan tuntutan mereka atas imbangan kebarangkalian. Adalah dihujahkan dalam rayuan ini terhadap keputusan tersebut bahawa mahkamah perbicaraan telah membuat beberapa penemuan fakta yang tidak munasabah berdasarkan keterangan sedia ada dan mahkamah telah salah arah dari segi undang-undang.

Diputuskan, membenarkan rayuan-rayuan, mengetepikan keputusan Mahkamah Tinggi dan memerintahkan, antara lain, responden-responden kedua dan ketiga membayar ganti rugi, sebagaimana ditaksirkan oleh timbalan pendaftar, kepada perayu-perayu:

(1) Perayu-perayu telah berjaya membuktikan kes-kes mereka atas imbangan kebarangkalian. Responden-responden kedua dan ketiga, sebaliknya, telah gagal membuktikan pembelaan mereka dari segi undang-undang.

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Pembelaan itu tidak konklusif berdasarkan fakta dan tidak berasas dari segi undang-undang (lihat perenggan 104, 94 & 91).

(2) Berdasarkan tuntutan-tuntutan yang berasaskan pendudukan dalam tahun 1909 atau 1910, tanpa saksi-saksi yang hidup secara langsung untuk memberi keterangan untuk perayu-perayu, ia tidak tidak realistik untuk mengharapkan keterangan yang lengkap, jelas dan tepat sepertimana bukti daripada segi matematik atau saintifik. Pertikaian dan ketidaktentuan dalam keterangan perayu-perayu yang wujud dalam tuntutan-tuntutan HAAN berdasarkan pendudukan nenek moyang. Tiada sebab yang ditunjukkan oleh keterangan atau dikemukakan dalam pemeriksaan balas bahawa tuntutan-tuntutan perayu-perayu itu tidak menurut undang-undang atau fakta dan keterangannya bukan *bona fide* atau ia adalah tidak benar. Walaupun kerajaan negeri dan jabatan-jabatannya yang dipertanggungjawabkan dengan bidang kuasa ke atas hutan dan tanah tersebut juga tidak mempunyai keterangan yang tepat. Lesen pembalakan dan pajakan-pajakan sementara yang dikeluarkan adalah tertakluk kepada kaji selidik, secara tersirat mengakui bahawa kawasan yang dikeluarkan boleh menjadi subjek tuntutan yang bertentangan (lihat perenggan perenggan 104).

(3) Tiada apa-apa dalam undang-undang yang tidak membenarkan pemerolehan HAAN oleh nenek moyang perayu-perayu dalam tahun 1909 atau 1910 ke atas tanah yang diduduki, diterangkan dan diusahakan dan juga diketepikan di bawah adat anak watan 'pulau ramu'. Setelah meneliti pemeriksaan, pemeriksaan balas dan pemeriksaan semula saksi-saksi, mahkamah ini memutuskan bahawa ia adalah disebabkan kegagalan untuk menjelaskan bahagian mana yang patut dikekalkan sebagai 'pulau ramu' dan bahagian mana yang patut dibersihkan, diusahakan dan ditanam dengan pokok-pokok yang menjadi sebab pertikaian itu, yang menjadikannya lebih buruk dengan fakta yang hutan itu telah dijalankan pembalakan dan kes itu bergantung kepada ingatan tentang apa yang telah diberitahu kepada perayu-perayu dan bukan daripada mana-mana ketidakbolehpercayaan atau ketidakbenaran yang wujud di pihak mereka yang telah menyebabkan keterangan mereka ditolak. Mahkamah perbicaraan tidak mendapati mereka sebagai saksi-saksi yang tidak jujur. Bahagian lain keterangan mereka adalah konsisten dan, meskipun mengandungi beberapa pertikaian, tidaklah bercanggah. Pendekatan pembelaan adalah hanya untuk mencabar perayu-perayu agar mengemukakan keterangan dan kemudian cuba memburukkannya (lihat perenggan 77, 102 & 103).

(4) Mahkamah Tinggi gagal untuk memahami fakta kes itu dan terkhilaf dengan menolak keterangan perayu-perayu, yang mengakibatkan dalam kesimpulan bahawa mereka telah gagal untuk membuktikan tuntutan-tuntutan HAAN mereka. Dalam mengambil kira

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tuntutan-tuntutan HAAN, di mana hak-hak telah dibuktikan sebelum itu tanpa rekod-rekod yang sedia ada, pendekatan realistik adalah untuk mengiktiraf yang ia lebih berkemungkinan daripada tidak terdapat sedikit keterangan dan banyak bergantung kepada sejarah lisan penuntut-penuntut dan nenek moyang mereka yang dapat dikaitkan daripada ingatan yang pudar. Pendekatan 'since evidence was not adduced, therefore adverse inference will be drawn' adalah lebih berkemungkinan untuk membawa kepada ketidakadilan. Sebab-sebab kegagalan perlu diperiksa untuk menentukan sama ada budi bicara patut dilaksanakan untuk membuat inferens bertentangan, dan jika sebab-sebab tidak dikemukakan ke mahkamah, tiada inferens bertentangan patut ditimbulkan (lihat perenggan 71 & 60).

(5) Pendekatan realistik adalah untuk menilai dan memahami fakta berdasarkan keterangan di hadapan mahkamah dan tidak mula membuat inferens bertentangan dan kesimpulan berdasarkan keterangan yang tidak dikemukakan atau berdasarkan spekulasi. Dalam kes-kes seperti berikut, ketidakupayaan mengemukakan keterangan tidak semestinya kerana tiada keterangan atau bahawa fakta adalah bercanggah. Ia mungkin hanya disebabkan keterangan tidak wujud. Budi bicara untuk membuat inferens bertentangan perlu dilaksanakan secara adil. Ia boleh dibuat jika dibuktikan bahawa keterangan wujud tetapi tidak dikemukakan (lihat s 114 Akta Keterangan 1950) (lihat perenggan 61–62).]

Notes

For cases on assessment of evidence, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1007–1010.

Cases referred to

APV Hill & Mills (M) Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor [2006] 3 MLJ 235, CA (refd)

Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 4 MLJ 204; [2010] 1 LNS 114, HC (refd)

Delgamuuk v British Columbia [2010] 4 MLJ 204; [1997] 3 SCR 1010, SC (refd)

Hamit bin Matusin & Anor v Superintendent of Land & Surveys & Anor [1991] 2 CLJ 1524, CA (folld)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793, FC (refd)

Selvaduray v Chinniah [1939] 8 MLJ 253, CA (refd)

Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)

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Legislation referred to

Evidence Act 1950 s 114
Federal Constitution art 5(1)
Forests Ordinance s 65
Fruit Trees Order 1899
Sarawak Land Code (Cap 81) ss 5(2), 18, 28
Land Settlement Ordinance 1933 s 66
Land Order 1920 ss 2, 22(i)
Rajah's Order 1875

Appeal from: Suit No 22–16, 22–19 of 2003 (High Court, Miri)

Baru Bian (Simon Siah Sy Jen and Chua Kuan Ching with him) (Baru Bian Advocates) for the appellant.
Victor Wong Lit Fah (Victor Wong & Chiew Advocates) for the first respondent.
Joseph Chioh Hock Hua (State Legal Officer, State Attorney General's Chambers) for the second and third respondents.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellants had commenced representative actions suing on behalf of themselves and 150 other occupiers, holders and claimants of native customary rights ('NCR') land individually claimed and/or owned by the plaintiffs respectively, located at Kampung Selanyau, Sibuti 98150 Bekenu, Miri, Division.

[2] The areas claimed were untitled land. The appellants alleged, in Suit No 22–16 of 2003 (MR), that their NCR over the disputed areas were infringed or impaired by the grant of a provisional lease described as Lot 3935 Lambir Land District to the first respondent on or about 6 February 2001. In Suit No 22–19 of 2003(MR), the appellants alleged that their NCR rights were infringed or impaired by the grant of a provisional lease on or about 14 April 1997 over Lot 3927 Lambir Land District to the first respondent, without extinguishment of their alleged NCR rights over the disputed areas. The respondents denied they had any such NCR rights as claimed.

[3] The boundaries of Lot 3935 and Lot 3927 generally correspond with the areas claimed by the appellants as shown in the maps marked 'A' and annexed to the respective statement of claims.

[4] The appellants' suits were tried together and dismissed upon the ground that the appellants herein had in each civil suit failed to prove their NCR claims upon a balance of probabilities. The appeal before this court related to the findings of fact and alleged misdirection of law in the High Court.

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[5] We noted that the primary grounds of appeal pertained to the grant by the second and third respondents of the two provisional leases to the area encompassing the lands claimed under NCR by the appellants, and the first respondent was merely applicant and the recipient of the provisional leases. The first respondent was named solely because in both cases it was the recipient of the provisional leases and in accordance therewith entered upon the lands to proceed to develop the lands. There is on record no evidence adduced that the first respondent was, apart from making the application and accepting the provisional leases, involved in the cause of action of the appellants against the second and third respondents. The merits of the case, therefore, concerned a matter between the appellants and the second and third respondents.

THE APPELLATE INTERVENTION ON FINDINGS OF FACT

[6] After citing *APV Hill & Mills (M) Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor* [2006] 3 MLJ 235 (CA) at p 243, it was submitted for the second and third respondents that the High Court:

> ... did not make any inference based on his findings of fact. He actually found as a fact, that the appellants had not discharged the burden of proof that they had NCR over the area claimed or had failed to prove their NCR claims on the balance of probabilities.

[7] In considering this submission, we examined and had to resort to the precise language describing concepts in civil procedure. We set out the following to demonstrate the concepts and their place in the steps towards conclusion and decision by a court:

(a) a plaintiff pleads the cause of action he relies upon and the facts, not the evidence, in support thereof;

(b) a defendant may dispute any or all of the facts in support pleaded by the plaintiff;

(c) a dispute on a fact in support is resolved by a finding of fact made upon the evidence adduced before the court, which may or may not include an assessment of credibility of a witness called and tested before the court;

(d) a process of reasoning, guided by law, applied upon (i) the undisputed facts together with (ii) the findings of fact made on disputed facts, determines the inferences of fact or mixed fact and law, where necessary, eg fraud, dishonesty, knowledge, wilfulness etc, that may be drawn; and

(e) the law, applied to an appreciation of the totality of (i) facts not disputed, (ii) findings of fact on disputed facts, and (iii) inferences of fact or mixed fact and law, leads to the conclusion and decision whether the plaintiff has proved its case upon a balance of probabilities.

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[8] The above demonstrates a process of inquiry and reasoning inherent in judicial decision making where the law applied to the facts lead to a conclusion and decision, as opposed to first having a conclusion and decision and then putting forth the 'reasoning' to justify it. The former is true reasoning leading to a conclusion and decision while in the latter the 'reasoning' is mere 'excuses' to justify a chosen conclusion and decision.

[9] The submission that an appellate court should not intervene upon a finding of fact by a trial court is, therefore, not a straightforward proposition as it seems at first glance. In *APV Hill & Mills (M) Sdn Bhd v AQ-Pacific Wide Sdn Bhd & Anor*, the Court of Appeal made it clear that intervention is warranted where 'the conclusion reached by the court of first instance is so unreasonable that no reasonable tribunal would have come to that conclusion'. Even, where a finding of fact is said to be based upon an assessment of credibility, intervention may be warranted where there is clear justification for doing so. The Federal Court in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 CLJ 793 (FC), held:

> In considering this appeal, we think it is right to say, at the risk of being trite, that like the Privy Council, we adhere to the principle that a trial court is in a more advantageous position to make findings of fact and assessing the credibility of witnesses so that we will not interfere with a decision which is based on such findings of fact unless there is a clear justification for doing so. (see *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18). However like the Privy Council, we will more readily interfere with the trial judge's inferences based on his findings as we would be in an equally good position as the trial Judge to make the determination. (see *Tay Kheng Hong v HeapMoh Steamship Co Ltd* [1964] 1 LNS 202 , at p 94, citing with approval *Benmax v Austin Motor Co Ltd* [1955] AC 370, and followed recently by this court in *China Airlines Ltd v Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517). There is a third point of principle which concerns the approach of the Privy Council, to which we also adhere namely that it will not as a general rule, entertain appeals from concurrent findings of fact by the Court of Appeal and the High Court. (see *Tominan bte Tukimin v Toh Kai Chup* [1989] 2 MLJ 257). The very narrow exceptions to this last mentioned rule appear from the headnote to the judgment of the Board in *Srimati Bibhabati Devi v Kumar Ramendra Narayyan Roy* [1946] AC 508 applied in *Tominan*).

[10] The words 'that no reasonable tribunal would have come to that conclusion' and 'we will not interfere in a decision which is based on such findings of facts unless there is a clear justification for doing so' means that in examining an appeal against a decision made upon a finding of fact, an appellate court would carry out an examination of the reasoning in respect of the finding of fact in the light of all of the evidence before the trial court. In our view, the true principle is that a finding of fact said to be based upon an 'assessment of credibility' remains perverse if it is perverse to the totality of the evidence before the court. Non-intervention with a finding by a trial judge

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based upon an assessment of credibility properly applies only where it is purely a finding after hearing the differing versions of two or more oral witnesses, with all other evidence not providing clear justification for intervention, for example, all the other evidence being neutral. For completeness, we reminded ourselves that while a civil trial is between litigants and the court has to decide as to whether a plaintiff has proved his claim upon a balance of probabilities, an appeal is made upon the grounds that the trial court had erred. That a court had erred is necessarily a matter of concern and demands anxious consideration.

THE SUMMATION OF FACTS BY THE HIGH COURT

[11] Guided by the above, we proceeded to examine the grounds of judgment as to the findings of fact by the High Court.

[12] In paras 1–29 of the grounds of judgment, the High Court summarised the case and the evidence placed before the High Court:

(a) paras 1–6 described briefly the two civil suits and who the plaintiffs were;

(b) paras 7 and 8 referred to the alienation of Lots 3927 and 3935 to Tung Cheong Sawmill Sdn Bhd respectively by the second and third respondents. The comment at paras 7 and 8 that the perimeter of the parcel of land in the civil suits commenced by the appellants overlaps with or is similar to the perimeter of the two provisional leases. The comment does not, in our view, appear to be in criticism. Indeed, it merely reflected that the appellants were suing upon the correct provisional leases issued and, therefore, assuming their claim can be substantiated, had the necessary locus to maintain their respective civil suits;

(c) para 9 described the appellants' claim that the alienation which included the appellants' NCR lands were, without prior extinguishment of their rights, unlawful, null and void, and that the appellants claimed that without extinguishment, their rights subsisted and the actions of the second and third respondents were in violation of art 5(1) of the Federal Constitution and, therefore, unconstitutional;

(d) para 10 referred to the claimed legitimate expectations that their rights, traditions, cultures and livelihoods would not be disrupted, extinguished or be restricted by the issue of the provisional leases to the first respondent, and their legal expectations that the lands which they claimed under NCR would be given to them under s 18 of the Sarawak Land Code;

(e) para 11 referred to the declarations and orders sought by the appellants herein;

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(f) para 12 referred to the denial by the second and third respondents and their submission that the appellants had not acquired nor did they have any NCR rights over the lands alienated to the first respondent;

(g) para 13 referred to the submission by the second and third respondents acted properly and legally, and that prior to the issue of the provisional leases, the relevant government departments did investigate and check all claims and/or entitlements to the lands to be alienated to but did not have any notice of any claims by the plaintiffs or any of the plaintiffs and/or have not found any such claims to be valid, proper or substantiated in law or in fact;

(h) para 14 began with a somewhat odd sounding comment: 'Although the defendants have put the plaintiffs to strict proof thereof, the defendants have not led any evidence to establish that the plaintiffs are not Kedayans or Jati Mirik or natives of Sarawak'. We found it was a case of mere clumsy narration. The rest of the paragraph mentioned the rights of natives under the laws of the State of Sarawak to create and acquire NCR land by clearing virgin jungle and farming the land which has been cleared or inheriting the native customary lands from their ancestors;

(i) para 15 directed itself that the burden was on the appellants to prove their claim of acquisition of NCR rights, and that it must be 16 proven by cogent evidence and not by bare assertions;

(j) para 16 sets out the evidence of Abu Bakar bin Pangis ('PW1'), that he was a community leader of the Kedayans, born in 1940, appointed a Penghulu of the Kedayan community in Sibuti in 1978 and became a Pemanca in 1994, and that the 153 plaintiffs in Suit 22–16 of 2003, lived in thirteen different villages, with distance in bracket indicates the distance of each village from the claimed NCR lands ie Kampung Satap (10km), Kampung Selanyau (5km), Kampung Kawang (10km), Kampung Danau (8km), Kampung Opak (4km), Kampung Kejapil (12km), Kampung Batu Satu Beraya (2km), Kampung Keluru Tengah (12km), Kampung Terhad (7km), Kampung Bungai (20km), Kampung Angus, Kampung Peluang Kelulit and Kampung Nyalau. It was stated that both Kpg Peluang Kelulit and Kpg Nyalau are very far from the NCR lands, and none of the 13 villages are situated within their claimed NCR lands or Lot 3935;

(k) para 17 referred to the testimony of PW1 that their ancestors came from Brunei in 1909 to a location near Selanyau, and that 1909 was a date which they found inscribed on a tomb stone located within their NCR lands;

(l) para 18 described why in 1920 their ancestors moved to the appellants' present location;

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(m) para 19 referred to the explanation by PW1 that the present appellants inherited the NCR lands from their ancestors, and how they 18 signed exh P2 and instructed Encik Dahlan bin Haji Gani ('PW4') to survey their NCR lands after each of the appellants had identified their individual plot of land to PW4 who then prepared the map 'M' (exh PI (A)) which set out the locality and acreage of each plot of land, and that PW1 and Penghulu Salim bin Hj Ebrahim ('PW2') signed on exh PI(A) to confirm the plaintiffs' claims to the NCR lands;

(n) para 20 mentioned the testimony of PW1 that he gathered information of the claims and wrote a letter dated 10 August 2001 (exh P3) to the superintendent of the Lands and Surveys, Miri Division but received no response;

(o) para 21 mentioned the testimony of PW1 that they heard rumours of alienation in 2001 to the first respondent, and when he, together with PW2 and Sapar bin Ismail ('PW3') went to the Lands and Surveys, Miri, to inquire, they round out that their lands had indeed been given to the first respondent as Lot 3935 Lambir Land District;

(p) para 22 mentioned that PW1 testified that they were never consulted or told of the alienation. They also did not know of any *gazette* notification affecting their lands and that to date no compensation was paid to them for their lands;

(q) para 23 noted that PW2 is also a community leader of the Kedayans at Sibuti, appointed a Penghulu in December 1999 and that his evidence as contained in his witness statement was similar to that of and corroborated the evidence of PW1 on the plaintiffs' claims to their NCR lands;

(r) para 25 turned to the testimony of Karim bin Enur ('PW5'). He had testified that their ancestors originally settled in Baram and migrated to their present village in Bakam in 1910 under his grandfather who died at the village in the 1930's;

(s) para 25 referred to the testimony of PW5 that their NCR lands are within the compound of their village, the farthest plot of land being within 30 minutes walk from their village and that they visited and farmed their lands daily, which had been originally cultivated and occupied by their ancestors and inherited by them and are planted with fruit trees;

(t) para 26 referred to the testimony of PW5 as to the appointment of PW4 and survey being carried out in 1996 to 1997 and that the map prepared by PW4 was tendered as exh P8;

(u) para 27 referred to PW5 and the other appellants hearing rumours of alienation, and upon going to the office of the second respondent with

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Madani bin Wahat ('PW6') and Asin bin Bujang, found that their NCR lands had been alienated to the first respondent; and

(v) para 28 referred to the testimony of PW5 that he was previously issued with a title for a parcel of native land described as Lot 713 Block 14 Lambir Land District with an area of 1.93500 hectares and that he had sold the land. It was stated that PW6 gave testimony similar to PW5.

[13] Paragraph 29 of the grounds of judgment was a general summation of the above.

[14] We find no material error in the summation by the High Court summarised above as would affect the outcome of the appeals before us.

[15] The appreciation of the facts and reasoning began at para 30 of the grounds of judgment, where the High Court began as follows:

> 30 Have the Plaintiffs proved their NCR claims to the lands on a balance of probabilities? I am aware of the evidentiary difficulties faced by the natives, in this case the plaintiffs, in proving their NCR which originate in times of limited record keeping and that the court ought to take a realistic and sympathetic approach when applying the rules of evidence: see *Agi Anak Bungkang & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 1 LNS 114 and *TR Nyutan Ak Jami & Ors v Lembaga Pembangunan Dan Lindungan Tanah & Ors,* Kuching High Court Suit No 22-249-1998. I am also aware of the comments made by the Court of Appeal in Superintendent of Lands 85 Surveys, *Bintulu v Nor Anak Nyawai & Ors* [2005] 3 CLJ 555 that the self-serving testimonies of some of the witness should carry little or no weight in the absence of some other credible corroborative evidence. In other words, what they have said during the trial must be tested against the evidence of the other witnesses, the undisputed facts in the case and the documentary exhibits referred to during the trial.

[16] We accept it is trite that in applying the rules of evidence, courts ought to adopt a realistic approach. But we caution ourselves against using the term 'a sympathetic approach' as it may lead the court to sympathising in favour of one party rather more than the other. In our view, an objective but realistic approach is essential to a fair and just decision.

[17] We bear in mind that the problems of proof in NCR claims and defence affect both the plaintiffs and the defendants, with an advantage to the defendants due to the burden of proof upon a balance of probabilities being upon the plaintiffs. Nevertheless, claimants of NCR rights have obvious difficulty in proving acquisition of NCR rights originating from times of limited record keeping.

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[18] Such times of limited record keeping is not confined to rights acquired in the distant past, predating or even in the early days of the Brooke administration, but also the not so distant past when surveys could have been made, and records developed but no steps were taken to do so. There may or may not be good reasons for not doing so, but in the absence of evidence relevant thereto adduced and tested, we hold it would be an error to draw any inferences against the Sarawak Government.

[19] Similarly, since the law, particularly prior to 1958, allowed rights to be acquired by clearing and occupation, and there being no requirement for any particular record to be kept, we do not think it fair and just that the government takes advantage and a plaintiff in an NCR claim be faulted, and adverse inferences necessarily drawn against them, from the absence of records. We recall the excerpt in *Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 4 MLJ 204; [2010] 1 LNS 114 from the decision of Lamer CJ in *Delgamuuk v British Columbia* [1997] 3 SCR 1010 as to the approach in native customary claims cases:

> In cases involving the determination of aboriginal rights, appellate intervention is also warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, applying the rules of evidence and, second interpreting the evidence before it. As I said in *Van der Peet* at par 68:
>
> > In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rule of evidence, to interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.
> >
> > The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Van der Peet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by 'their bridging of aboriginal and non-aboriginal cultures' (at paragraph 42). Accordingly 'act must take into account the perspective of the aboriginal people claiming the right ... while at the same time taking into account the perspective of the common law' such that 'true reconciliation will, equally, place weight on each.' (at paras 49 and 50)
> >
> > In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly sin generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. I however, that accommodation must be done in a manner

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which does not strain ' the Canadian legal and constitutional structure' (at para 49). Both the principles laid down in *Van der Peet* - first that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit -must be understood against this background.

[20] Indeed, the focus must be to determine in every NCR claim, whether the claim is in accordance with law and is bona fide or genuine, and not who wins in the cut, thrust and parry of technicalities much loved as a substitute for getting the facts right as to the merits.

BURDEN OF PROOF AND BALANCE OF PROBABILITIES

[21] Be that as it may, the law itself is fundamentally fair and just. It is just that the burden is upon a plaintiff to prove his claim. It is fair that he has to prove the facts in support of his claim not beyond reasonable doubt but only upon a balance of probabilities.

[22] Objectively speaking, the nature of proof of a claim is not about believing one party or witness and not the other. Otherwise, justice in civil litigation falls prey to the uncertainty of who and what is believed or not by whoever presides in the court. It is to avoid this and to put the matter of proof upon an objective basis that the two fundamental concepts of the burden of proof and proof upon a balance of probabilities were developed.

[23] But all this would come to nought if, in arriving at its conclusion and decision, the court erred (a) in the application of these two fundamental concepts of burden of proof and balance of probabilities, and/or (b) in the appreciation of the facts of the case.

[24] To appreciate how burden of proof functions, it is necessary to bear in mind the process of determination of facts in civil litigation:

(a) a plaintiff relying upon a cause of action carries the burden of proving the facts in support of it. He does so by setting out such facts in his pleadings, thereby giving the other party notice and an opportunity to check and verify that those facts are true and correctly stated, and the other party may, to enable him to do so, require further and better particulars;

(b) in respect of those facts in support:

(i) if not disputed by the defence, it is deemed to have been accepted and it is not necessary to prove it;

(ii) if a fact in support is disputed and the plaintiff had disclosed the

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nature of the evidence relied upon, then if conceded by the defence it is deemed to have been proved, and no further proof is necessary;

(iii) if a fact in support is disputed and the plaintiff had disclosed the nature of the evidence relied upon, and it remained disputed by the defence, but if after discovery and or interrogatory it was conceded by the defence, it is deemed to have been proved, and no further proof is necessary.

(c) if not conceded, a disputed fact in support proceeds to trial stage where:

(i) if as to a disputed fact no evidence is produced by the plaintiff in the form of oral testimony of a witness or documentary evidence in support thereof, then it is held to have been not proved;

(ii) if as to the disputed fact evidence is produced in the form of oral testimony of a witness or documentary evidence, and such evidence is not challenged in cross-examination, then it is held to have been proved;

(iii) if as to the disputed fact evidence is produced in the form of oral testimony of a witness or documentary evidence produced, and such evidence is not demolished during cross-examination, and no evidence to support the cross-examination is adduced, or if adduced failed to support the basis of cross-examination, then the evidence is held to remain unshaken and the disputed fact have been proved;

(iv) if as to the disputed fact evidence is produced in the form of oral testimony of a witness or documentary evidence, and cross-examination succeeds to demolish that evidence, then the disputed fact is held to be not proved; and

(v) if as to a disputed fact evidence is produced in the form of oral testimony of a witness or documentary evidence, and despite cross-examination the version is maintained, it is for the court to assess what weight is to be given to such evidence in proof of the disputed fact.

[25] Unless so provided by law or agreement, it is rare that any evidence produced is conclusive proof of a disputed fact. More often than not the evidence tend to support each party. This in fact is the bona fide cause of dispute between the parties. Hence, the concept of proof upon a balance of probabilities had been adopted to resolve the dispute. It functions in this manner:

(a) it starts with a disputed fact in support of the plaintiff's case being just his version of a fact;

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(b) this version gains probability when some evidence is produced by the plaintiff as the party upon whom the burden of proving that disputed fact lies; and

(c) if the other party produces no evidence to contradict that evidence or to support its own version of the disputed fact, then the party upon whom the burden lies is held to have proved its version of the disputed fact upon a balance of probabilities; but

(d) if the other party produces some evidence to contradict that evidence or to support its own version of the disputed fact, that other party is said to have placed its evidence upon 'the balance of probabilities', and depending upon the weight given to the evidence of each party, the trial court determines in whose favour that balance of probabilities points in respect of that disputed fact.

[26] So much for burden of proof and proof upon a balance of probabilities in respect of a disputed fact.

[27] A conclusion and decision in a civil suit as to whether a plaintiff has proved his claim upon a balance of probabilities, is arrived at by application of law to the totality of the facts (a) not disputed, (b) facts conceded, agreed and (c) findings of fact found to be proved upon a balance of probabilities as explained above. It involves an appreciation of the facts which we address next.

PRELIMINARY OBSERVATION

[28] The preliminary observation we make is that in judicial appreciation of the facts, it is just as important to examine and appreciate correctly the meaning of the terms used.

[29] For example, a term sometimes used to discount evidence is that they are self-serving. It is important to appreciate what it means particularly in NCR claims where more often than not there is little or no independent evidence.

[30] The starting point is that there is no law against a person giving testimony in support of his own claim. Such testimony in support naturally appears to favour his own case, hence often labelled as self-serving. But the true reason for rejecting any testimony is if it is unreliable. Thus, to be rejected or dismissed as unreliable, the 'self-serving' testimony must be more than the mere incident of one's testimony being in favour of oneself. It must be demonstrated it is unreliable. It is unreliable testimony if it is made by a person having or showing concern only about his own needs or interests in disregard of the truth or the interests of others. If such is demonstrated, there is reason to doubt and be cautious about the reliability of his evidence. In such a case, the

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good exercise of judicial discretion demands that there be corroborative evidence, to give reassurance as to the reliability of his evidence. The Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 (CA) was entirely right that self serving statements be given little or no weight unless supported by some other credible corroborative evidence. But it remains that it is necessary to demonstrate that the self serving testimony is in fact unreliable in that it has or shows concern only about his own needs or interests, in disregard of the truth or the interests of others.

[31] Whether a person's testimony on his own behalf is actually self-serving is necessarily a fact to be found from an examination of the testimony. While an examination-in-chief sets out his testimony, it is the testing conducted in cross-examination of that testimony that will show whether the witness is giving testimony that is actually self-serving or merely appearing to be so. For example, if the witness avoids or evades answering directly questions put in cross-examination to test the truth or correctness of his testimony in favour of his own case, or remembers well facts in his favour but vague about facts not in his favour, then it may be a proper basis to conclude his testimony is self serving and to be examined with caution as to what weight may be given to it, or if at all. But it must be recognised that is not necessarily the only conclusion that may be drawn. There may be other reasons for his behaviour under cross-examination. There may be bona fide reasons why a person cannot remember. Thus, to be fair, the question must be put to him that his answer for example, that he cannot remember is untrue and his testimony is self-serving and unreliable. His answer to, or how he answers, that question provides the basis for a finding whether his testimony was in fact unreliable.

APPRECIATION OF THE FACTS BY THE HIGH COURT

[32] We return now to the grounds of judgment of the High Court. The appreciation of the facts continued with para 31 of the grounds of judgment where the High Court addressed the testimony of PW1 Abu Bakar bin Pangis, and PW2 Salim bin Hj Ebrahim (the first and second plaintiffs in Suit No 22–16 of 2003 (MR)) and PW5 Karim bin Enur, and the map PI(A) and forms prepared to verify the claims.

[33] In para 31 at line 9, the High Court held:

> ... The evidence showed that the map PI (A) did not exist on 3 May 1999. PW1 used the date because it was the date stated in the forms and used by the other claimants. Based on the dates used by PW2 and PW5, the maps were likely to be ready only in 2002. They said that they verified the claims to the individual plot of land based on what the other plaintiffs had told them. From the evidence, it was obvious that they had no personal knowledge of each and every claim made by the other plaintiffs. For

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example, PW1 did not know how many of the plaintiffs lived in Kpg Satap or in Kpg Selanyau or Kpg Kawang or in the other villages or when were some of the villages established.

[34] With respect, given that Lot 3927 was alienated on 14 July 1997 and Lot 3935 on 6 February 2001, whether the sketches came into existence on 3 May 1999 or on 3 July 2002 is largely immaterial. What is overlooked is that the actions were commenced by PW1, PW2 and PW3 Sapar bin Ismail, for themselves and other claimants, and although PW1, PW2 and PW5 may have no direct personal knowledge, they were the persons to whom the various persons making a claim pointed out their individual plots on the ground, and they recorded that on the maps. They did not purport to be surveyors and the maps are at best sketches. All that meant is that the sketch maps cannot be used as survey maps for the issue of land titles, but the sketches corroborated these witnesses' testimony that the other claimants pointed out to them where their individual plots were on the ground. Likewise, the forms.

[35] Paragraphs 32 and 33 dealt with the testimony of PW4 Dahlah bin Gani who prepared the two maps respectively marked as 'M' (exh PI (A), P1(B) and P8. The finding made was that the maps were prepared by him and based on what the plaintiffs had told him regarding the locality and size of their individual plot of land, but he had no personal knowledge of each of the plaintiffs' NCR claims and the maps did not provide any bearings and or reference points and were not drawn to scale, did not show the locality of or the distance of the claimed NCR lands from Kg Opak, Kg Batu Satu Beraya, Kg Selanyau or Kg Bakam or Sg Jalid or Sg Payau. The High Court relied upon the fact PW4 agreed in his evidence that the two maps prepared by him were only sketch plans of the plots of land and were not proper maps or survey plans, and concluded therefore little weight should be given to the two maps prepared by PW4 for and on behalf of the plaintiffs in these two suits.

[36] With respect, the High Court overlooked the fact that even though his maps were sketches, the significance of the testimony of PW4 is that he had been on the ground and the claimants of NCR rights had showed him where their individual plots were. This if taken into consideration with what was accepted in para 34 that the appellants in Suit 22–16 of 2003 filled in and signed their claim forms in 1999 after PW4 had completed the survey, and in Suit 22–19 of 2003 in 1999 after PW4 said he had completed his survey in 1996–1997, shows that the claim is not a claim based on fabricated sketch maps, but

(a) the sketch maps were drawn by PW4;

(b) PW4 drew the sketch maps to record the lands pointed out to him by the claimants; and

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(c) the lands were real and were where they were pointed out to be. A

[37] The sketch maps buttressed the testimony of PW4. The key aspect of the testimony of PW4 to this case is that the plaintiffs had shown to him actual lands claimed by the plaintiffs under NCR. The lands themselves were real and not some figment of imagination drawn on pieces of paper. B

[38] In our view, a realistic approach must bear in mind also that:

(a) NCR lands are held without requirement of survey, registration and issued document of title; C

(b) the natives living off their NCR lands are a subsistence culture, not sophisticated businessmen, and can hardly be expected to afford to pay quit rents, let alone survey fees; and

(c) even the government makes it a condition the timber licencees and lessees of provisional leases to undertake and bear the cost of surveys. D

[39] At paras 35 and 36, the High Court took into consideration that:

(a) PW1 who claimed 18.30 acres for himself was unable to point to his plot of land on the map (exh P1(B)) when he was asked to do so; E

(b) PW1 did not know the date of birth of his father though he knew that his father passed away in April 1972;

and said: F

> None of the plaintiffs in either suit had been born yet in 1909 or 1910 or the 1920's or 1930's when their ancestors had purportedly cleared and settled on the lands. PW1 was born in 1940, PW2 in 1949 and PW5 in 1943. Their evidence or accounts of their respective NCR claims were based on what they heard or what they were told or from family oral history. None of them had exhibited their birth G certificate which would have shown the name of their parents and their place of birth. These would have substantiated their claims that they were born at their village or at the claimed NCR lands.

[40] With respect, the map reading skills or lack of it, and not knowing the H date of birth of one's father are not germane to the primary question of whether there was land and that the land was occupied under NCR. In re-examination, PW1 testified his father died at the age of 63 years. Given that he died in 1972, he must have been born in 1909. More germane to the issue, the High Court misappreciated the fact that the witness had lived on that land and had been I brought up thereon by his father, who since he was born in 1909, would have been brought up by his father's father (PW1's grandfather). If the father had been alive, he would have been 101 years old when trial began in 2010. It would not be realistic to demand there be witnesses who were alive in 1909 and

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able to know about the occupation then from their own knowledge. It would be unjust to reject the testimony of their great-grandchildren and grandchildren who inherited and continue to live off that land on the grounds that one is not satisfied with their testimony because the origins of the claim was so long ago and what the present descendants' knowledge and memories are not crystal clear. In our view, PW1's testimony was consistent with the facts asserted in the claim, and is evidence that ought to be taken into consideration.

[41] In our view, while it is true birth certificates, provided there is evidence that birth certificates were in fact issued in those days, would have been evidence and added further weight, but it is a serious error of appreciation of the evidence to hold that with the failure to produce birth certificates, they have failed to substantiate their claim that they were born and brought up there. It is not established they had been issued birth certificates but when asked to produce the same was unable to do so and had no credible explanation. If it was the oversight of counsel, is the jurisprudence of this country that the mistake of counsel should not be visited upon a litigant.

[42] At para 37, the High Court referred to the testimony of PW1 as to the tombstone said to be dated 1909, and the point that this piece of evidence was never challenged by the respondents. But the High Court held:

> However, he never produced any photograph of this tomb stone which was dated 1909 or any proof to substantiate what he said. PW7 took the photographs which were referred to during the trial and testified that there was a tomb stone dated 1824 but PW7 also did not refer to any specific photographs to show the tomb stone with the date '1909' on it or the tomb stone with the date '1824' on it. The photographs were not tendered as exhibits. PW2 in his cross-examination said that he did not know how old were the graves found on their NCR lands. The maps prepared by PW4 did not refer to any graves within the claimed NCR lands.

[43] At para 38, the High Court referred to the testimony of PW5 that his father was awarded the *Orang Kaya* title by the then Sultan of Brunei and awarded the Long Service Medal by Raja Vyner Brooke, but took his testimony to task that 'he did not exhibit any certificate, medal or photograph to substantiate his claims'.

[44] In the same para 38, the High Court referred to the testimony of PW5 that the areas claimed by them were native customary land and that some of them had been issued a document of title for other parcels of NCR land which belonged to them, and that PW1 had said that he was previously issued a document of title to a parcel of NCR land described as Lot 713 Block 14 Lambir Land District and that he had sold this parcel of land, but took them to task that:

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A

> However, he did not exhibit a copy of the document of title or the sale and purchase agreement or memorandum of transfer to substantiate what he had said.

B

[45] With respect, the High Court failed to appreciate that while the photographs and the other documents if produced, would only add to establishing the credibility of the witnesses, but the mere failure to produce does not mean the witnesses are necessarily unreliable and cannot be believed. The photographs were in bundle C, pp 366–378. They were referred to in the cross-examination of PW1 who did not know who took them. PW2 testified in examination-in-chief that he was present when they were taken by one Nuryasin bin Abu Bakar ('PW7'). He testified the graves photographed by Nuryasin were those of their ancestors but the names and years on the graves were no longer visible, and that they were there before he was born. He was cross-examined by counsel for the second and third respondents only on the point he could not have known whether names or years were inscribed on the graves. The existence that there were the graves of ancestors and that they were there before he was born were not challenged.

C

D

[46] PW7 testified on the photographs of the old graves located at Sungai Payau. Though he did not know where the originals and the negatives were, he confirmed he went to the tomb, with the date 1824 on it, with Lajim bin Ali, an old man who asked him to take the photographs, and that he took the photographs. In cross-examination, he was asked if he established the history of the grave and as to who asked him to take the photographs. He answered he did not and that it was Lajim bin Ali who asked him. He was also cross-examined on who were the persons in the photographs, who wrote on the photographs and the direction of the grave from his house. He was not challenged as to the existence of the graves.

E

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[47] The non-production, in this case, of the photographs and other documents is not a case of the witnesses being unable to produce the photographs and other documents mentioned, when challenged to do so, which would lead to the conclusion such photographs and documents do not exist. Only then would it be judicially fair to draw an adverse inference or conclude that the witnesses who testified there were photographs and the other documents were unreliable and their testimony cannot be accepted.

G

H

[48] At para 39, the High Court referred to certain documents marked for identification as ID6 and ID9. Though the High Court recognised they were not tendered as exhibits, it took ID6 and ID9 into consideration:

I

> Notwithstanding that, ID6A showed that it was a verification of land boundary of a parcel of land described as F/L45 claimed by Sapar bin Ismail. ID9A showed that the documents were in respect of a case 'Mustapha bin Ujan (40 orang) v Nawang bin Malik (13 Orang) the Native Court'.

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[49] With respect, if only 'ID'ed, the documents should not be taken into consideration as appear to be done in paras 39 and 40 to hold:

> Therefore, the documents in respect of F/L45, 1D6 and ID9 did not relate to the same plot of land claimed by the plaintiffs in these suits and did not substantiate the testimony of the plaintiffs' witnesses that the areas claimed by them were native customary land.

[50] At paras 41, 42 and 43, the High Court referred to an article giving a brief history of the migration of the Kedayan from Brunei to Sibuti and the settlement at Kpg Selanyu, that the village was founded in the late 1920's and early 30's by families from Kg Bungei, an early Kedayan settlement in the Sibuti area and from Kg Gadong in Brunei, and that it stated that the settlers were attracted to Selanyau by its rich *padi* land, and held:

> These, contrary to the submissions of the plaintiffs' counsel, did not support what PW1 had said that the plaintiffs' ancestors originally migrated from Sungai Kedayan in Brunei.

[51] With respect, the High Court failed to appreciate that regardless where their ancestors originated from in those times, their reasons for moving, and by whichever route their ancestors took to end upon the NCR lands claimed, they are today citizens of Malaysia and natives of Sarawak, and can rightfully maintain a claim to NCR rights to land. They had provided an explanation why they were no longer residing upon the claimed lands but in villages in walking distance or minutes away by car now. They have testified upon affirmation to tell the truth, and the test whether the testimony can be accepted and given any weight is not based upon an inclination or disinclination to believe the witness, but upon whether the testimony is demonstrated to be incorrect or untrue or the witness is unreliable.

[52] Of more relevance is the question considered by the High Court at paras 44 and 45, that if they had NCR rights over the lands now claimed thereunder, why did they not object when a timber licence T/0029 (exh D16) was issued in 1966 to the first respondent in Appeal Q-01–237–05 of 2012, and timber licence T/0030 was issued to Yak Lee Timber Company Ltd in the same year. At para 45, the High Court said:

> 45 If two timber licences were issued in respect of the areas claimed by them as their NCR lands and were being logged for timbers since 1966 and without any protest by the plaintiffs, these raised serious doubts on their evidence that the lands were settled by their ancestors and planted with padi and fruit trees. There would be little or no merchantable timbers to be extracted if the lands had been cleared and planted with padi and fruit trees. Further, why did PW1 and the other plaintiffs not protest or take actions against the licences or the timber companies at the material times since the logging would have affected and or impaired their NCR lands. Why did

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A

they not claim or submit their claim to their NCR lands to the Lands & Surveys earlier but waited until 2001, after the two parcels of land had been alienated to the 1st Defendant?

B

[53] With respect, the High Court appeared to misappreciate the fact that on cleared and occupied land, there is no timber to be felled and therefore no reason for the timber licensee to enter and the natives to complain. The High Court overlooked that in cross-examination, at RR 2(1) Part B p 152, and after PW2 told thecourt he was born in 1949:

C

> Q: Are you saying that the durian trees, cempedak trees, terap trees, engkabang trees (kekawang in Kedayan dialect) and asam trees (embang or mambangan) were all planted before 1949?
>
> A: Yes as far as I know.

D

[54] The cross-examination moved on to ask whether he knew one Taib bin Haji Mawang. It was not put to him that his answer and testimony in respect of the fruit trees being planted before 1949 could not be accepted. Then his response to the put question would provide the basis to determine whether his testimony as to the fruit trees could be accepted. The question as asked above did not challenge his testimony. Indeed, that the cross-examination moved on immediately to the subject of Taib bin Haji Mawang tends to show that his testimony that the fruit trees were planted before he was born was accepted. This, the High Court failed to take into consideration.

E

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[55] Instead, the High Court took note that PW1 worked for Yak Lee Timber Company Ltd, but overlooked that PW1 in cross-examination was asked the question that Yak Lee was extracting timber from the whole of the land claimed and he replied 'Not all'.

G

[56] PW2 in his testimony, in cross and re-examination, had explained that part of their lands were not cleared for cultivation but maintained under the Kedayan custom of 'Pulau Ramu' equivalent to the Iban 'Pemakai Menoa'. To be more precise, it would be the Iban 'Pulau Galau' in their *pemakai menoa*.

H

[57] At RR 2(1) Part B, p 105, PW1 had replied to a put question as follows:

> Put: That the Provisional Lease (PL) issued to the 1st Defendant is lawful and proper and issued in accordance with the provision of the Sarawak Land Code.
>
> A: I agree because they take the wood not the land.

I

[58] Although it did not appear to be a precise answer to the put question, the answer showed he agreed the provisional lease was valid and that their cause

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of action was not for the logging for timber but the taking away of the land. The High Court failed to appreciate it is true that a timber licence is for logging only, and does not take away ownership of the land. The present claim of breach of NCR rights to land arose from the issue of provisional leases to land to the first respondent. It is the taking away of land the appellants' claim to hold under NCR that is being objected to. This, the High Court appeared to have misappreciated.

[59] At para 46, the High Court addressed the evidence of aerial photographs taken in 1947 and 1951 which showed that the areas claimed by the plaintiffs in both suits were then virgin jungles. This is consistent with the issue of timber extraction licenses in 1966. The High Court held this contradicted the appellants' claims that their ancestors had in 1909 and 1910 cleared the virgin jungles, planted padi and fruit trees and had settled on the lands since then. Notwithstanding that at para 36, the High Court had stated 'None of the plaintiffs in either suit had been born yet in 1909 or 1910 or the 1920's or 1930's when their ancestors had purportedly cleared and settled on the lands.' The High Court failed to appreciate that since they were not yet born then, they could not be direct witnesses of settlement in those days, and thus if they erred as to in what years the lands were cleared and planted by their ancestors, that error should not affect or raise serious doubts on their present NCR claim as it was an error as to a fact they were not direct witnesses of. In down to earth terms, an understandable error. And we note that the High Court erred in reference to 'or the 1920's or 1930's when their ancestors had purportedly cleared and settled on the lands', as the cause of action of the appellants were clearly precidated upon settling on the claimed lands in 1909 or 1910, and 1920 was the year they claimed to have moved to the places they currently reside because of a disease outbreak.

[60] In our view, in considering NCR claims where rights are established in the distant past without ready records, a realistic approach must recognise that there is more likely than not very little hard evidence, and much would rely upon the oral history the claimants and their elders can relate from fragile memories. The approach of 'since evidence was not adduced, therefore adverse inference will be drawn' is more likely to lead to injustice. In our view, the reasons for the failure must be examined in order to determine whether the discretion ought to be exercised to draw an adverse inference, and if the reasons are not before the court, no adverse inference ought to be raised.

[61] The realistic approach is to evaluate and appreciate the facts based upon the evidence that is before the court and not embark upon drawing adverse inferences and conclusions on evidence not presented or on speculation. In

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cases such as these, inability to present evidence is not necessarily because there is no evidence or that the fact is to the contrary, but it may simply be because the evidence does not exist.

[62] To enable us to focus more clearly, we asked ourselves the question whether an NCR right ceases to be a right because no evidence could be produced? It serves to underline that the discretion to draw an adverse inference must be judicially exercised. It may be drawn if it is shown that the evidence is available but was not produced (see s 114 of the Evidence Act 1950). The second and third respondents must live with the consequences of dearth of evidence from the decision by its predecessors as to (a) the manner NCR claims are established and (b) not conducting surveys of land claimed under NCR to determine what lands are not subject to an NCR or other adverse claim.

[63] We note that a timber licence is expressed to be subject to the native and other rights specified in s 65 of the Forests Ordinance and to all other existing lawful rights, and in a provisional lease it is provided that 'The holder of this provisional lease shall not be entitled to a lease of an area equal to the area above stated but only to such an area as the survey shows to be available'. In very clear terms, the relevant department did not know and did not represent that the boundaries are accurate but were subject to final surveys or 'survey shows to be available'. To be fair to the first respondent, there was no indication by the second and third respondents to the first respondent that (a) there were classified photographs showing cleared areas within those boundaries, and (b) there could be adverse NCR claims. The second and third respondents imposed strict conditions for the first respondent to comply and the first respondent faced the possibility of spending money to comply and develop, but because failure to comply fully, lose not only the provisional lease but also the money spent.

[64] The High Court then went on to the defence case and evidence.

[65] Paragraphs 47, 48, 49 and 50 dealt with the testimony of DW1 Abdul Razak bin Morshidi. He was the land officer with the Lands 85 Surveys Department, Miri Division from 15 November 2004 until 30 June 2009. He testified that before a provisional lease was issued, the department would determine the status of the land applied for based on the official records, namely the cadastral plan, aerial photographs, land use maps derived from the aerial photographs and other official records of other departments such as the Forests Department of Sarawak. Thus, based on the aerial photographs and the land use map, the boundary of the land, the department would recommend to departmental headquarters to be issued under a provisional lease would exclude

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all cleared, cultivated or farmed areas because they were likely to have native customary rights or claims and were regarded as encumbrances.

[66] Paragraph 51 dealt with the testimony of DW3 Saiful Izam bin Kassim, a staff surveyor and cartographer with the Lands & Surveys Department Headquarters, Sarawak. At para 52, the High Court said:

> 52. He said that from his investigation and based on the pattern, shape. Size, tone and texture contained in the aerial photographs which were taken in 1947 and 1951, there were approximately 125 hectares within the boundary of Lot 3935 which were cleared areas whereas there were approximately 1,056 hectares of primary or virgin jungles. These gave a total of approximately 1,181 hectares for Lot 3935. He said that for Lot 3927, there were approximately 2 hectares of land which were cleared areas whereas there were approximately 1,002 hectares of primary jungles. These gave a total of approximately 1,004 hectares for Lot 3927. These cleared areas would be excluded from Lot 3935 and 3927 when the perimeter surveys are carried out pursuant to s 28 of the Land Code.

[67] Then at para 53, the High Court held:

> 53 This evidence contrasted with the plaintiffs' evidence that their ancestors had cleared 1,181 hectares and 1,004 hectares of virgin jungles and had planted padi and fruit trees on the two parcels of land. There is no evidence before the court that any of the plaintiffs and or their ancestors had cleared the 125 hectares or 2 hectares respectively. From the evidence before the court, the plaintiffs, each suit, have failed to prove their NCR claims on the balance of probabilities.

[68] The summation of the testimony of DW3 at para 52 of the grounds of judgment showed that, notwithstanding the version of DWl as what would be recommended, the cleared 2 hectares area was included into the provisional lease of Lot 3927 issued, with the explanation it was to be excluded later when the perimeter surveys under s 28 of the Land Code is carried out. Likewise, in the case of Lot 3935 for 125 hectares of cleared areas.

[69] With respect, it showed the High Court failed to consider that fact that the testimony of DW3 showed that the provisional leases issued by the departmental headquarters included the cleared areas which DW1 testified would be excluded. At the very least, there was acknowledgement of a total of approximately 127 hectares that their photographs of 1947 and 1951, which as DW1 testified, indicated they were likely to have native customary rights or claims and were regarded as encumbrances.

[70] Instead, the High Court focused upon the appellants' testimony that their ancestors cleared 1,181 and 1,004 hectares of virgin jungles and planted *padi* and fruit trees on the two parcels of land to hold that this is contradicted by the aerial photographs of 1947 and 1951 and conclude that 'From the

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evidence before the court, the plaintiffs, each suit, have failed to prove their NCR claims on the balance of probabilities.' A

[71] From the foregoing, it is clear that the High Court had misappreciated the facts of the case adduced it and erred in rejecting the evidence adduced by the appellants, resulting in the conclusion that the appellants had failed to prove their NCR claims. The decision on that ground ought to be set aside. But that is not the end of the matter. To succeed, the burden is upon the appellants as the plaintiffs to prove their NCR claims upon a balance of probabilities. B

OUR APPRECIATION OF THE BALANCE OF PROBABILITIES C

[72] We begin with the question of law raised by the second and third respondents for the benefit of all the defendants, before proceeding to the testimonies of DW1 and DW3 and the aerial photographs of 1947 and 1951 that the second and third respondents have put on their side of the 'balance of probabilities'. D

[73] We address the laws as follows. E

[74] Notwithstanding that the Brooke Administration began about 30 years earlier in 1841, the laws pertaining to acquisition of land rights began with the Rajah's Order 1875, which, inter alia, provided:

> Whereas it is a common practice among the native community to make large clearings of old jungle and afterwards abandon them, I hereby direct that should any clearance of the kind be made in future, and the persons who cleared the ground allow the same to go uncared for, they will lose all claim or title to such lands; and should anyone who is desirous of making gardens thereon, they will be permitted to become squatters; and F

G

[75] This order was to restrict and penalise unnecessary clearing, but restrict how new NCR lands can be acquired or that NCR rights are restricted to cleared land maintained under occupation and cultivation. In our view since it specifically forbade unnecessary clearing, it implicitly accepted the practice of 'Pulau Ramu' or 'Pulau Galau'. H

[76] The Fruit Trees Order 1899, provided, inter alia, that:

> unless they can clearly prove such trees were planted and cultivated by them; nor may any rattan lands be claimed or sold, unless such lands were planted by those claiming or selling them. I

[77] This order pertains to claims on fruit trees and produce, and that lands with rattan cannot be claimed or sold unless it is shown they were planted by

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the party claiming or selling them. It did not affect how new NCR lands can be acquired. There is nothing to disallow therefore the acquisition of NCR rights by the appellants ancestors in 1909 or 1910 to land occupied, cleared and cultivated as well as set aside under 'Pulau Ramu'.

[78] For completeness, we address the subsequent law. Although not applicable in respect of creation of the NCR right claimed, we examined the subsequent laws as to whether they took away any rights previously acquired.

[79] Section 22(i) of the Land Order 1920 provided:

> Under this part lands may be occupied by Natives free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws provided that where possible claims to fruit groves and farming lands shall be registered. Records of such claims shall be kept by all Native Headman and also in the Land Office in each district.

[80] We note that while s 22(i) provided that lands may be occupied by natives free of all charges for agriculture in accordance with the customary laws. The focus was where possible such lands cleared and cultivated for agricultural produce shall be registered. The land order however did not provide to nullify existing or disallow future acquisition of, NCR rights to land, or to provide that the only NCR right that can be acquired are for lands cleared and cultivated for agricultural produce.

[81] The supplementary to Land Order No VIII, 1920 provides at s 2 that:

> 2 (i) Native land reserves shall be made in suitable situations and these shall be divided into lots of three acres and any native born subject of His Highness the Rajah shall be permitted to occupy one such lot free of all charges (excepting fees for demarcation) provided that no person not being a native of the Country shall occupy land in such reserves and further that no one person shall occupy more than one lot at one and the same time.

[82] In our view, s 2 of the supplementary should not be read as being more than what it says, that native land reserves shall be made in suitable locations where a native born shall be entitled to occupy one lot. There is no provision that existing NCR rights and acquisition of new land under NCR outside of such reserves are nullified or curtailed. Thus, the Land Order 1920 did not deal with or nullify previously acquired NCR.

[83] It was submitted that s 66 of the Land Settlement Ordinance enacted on 22 June 1933, meant that even if any NCR to land is acquired, it applied only to :

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(a) land planted with fruit trees, when the number of fruit trees amounts to twenty and upwards to each acre;

(b) land that is in continuous occupation or has been cultivated or built on within three years;

(c) burial grounds or shrines;

(d) usual rights of way for men and animals from rivers, roads, or houses to any or all of the above.

[84] The subsequent Secretariat Circular No 12/1933, provided:

(a) the right to cultivate cleared land vests in the community with priority to the heirs of the original feller of big jungle. This right must be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community. The cycle is, in your eyes, not a matter for rule of thumb but for expert native opinion;

(b) where not inconsistent with the above, the existence of permanent cultivation of a reasonable density is evidence of customary ownership as opposed to customary right of user;

(c) individual ownership is limited by the customary right of the community to say in the matter of disposal to anyone outside the community;

(d) no community or individual may hold up in excess of requirements and, the extreme case, removal to another district automatically extinguishes all rights of the user. The old Order (a) (ie Fruit Trees Order 1899) dated 10 August 1899 is an excellent exposition of this principle.

[85] The Secretariat Circular, read in full, is in our view, a direction to officers involved in land administration. The applicable law remained the Land Settlement Ordinance 1933.

[86] It is fair to say that from 1933, the law provided clearly that new NCR claims may only be acquired for developing the equivalent of 'temuda' lands.

[87] Then came Land Code (Sarawak Cap 81). Section 5(2) thereof provided that the methods by which native customary rights may be created are

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

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(d) the use of land for a burial ground or shrine; or

(e) the use of land of any class for rights of way.

[88] Nothing in the Land Order 1920, the Land Settlement Ordinance 1933 nor the Land Code (Sarawak Cap 81) sought to nullify NCR rights previously acquired. The custom of maintaining a 'pulau galau', an area set aside under primary forest cover to source wood for longhouses and other uses, and other forest produce is an established custom prior to the Brooke administration. It was part of the *pemakai menoa* which includes the *temuda* lands. It would appear the acquisition of NCR rights over 'Pulau Ramu' or 'Pulau Galau' was not restricted until 1933.

[89] Disputes over land under 'Pulau Galau' is not new. If land had been cleared and occupied, no one would think it was unclaimed land. But land set aside under 'pulau Galau' remaining under forest cover, are as likely to be mistaken then as now, for unclaimed land. Occupation by new arrivals are seen by those claiming it as 'pulau galau' as encroachment, and was an unending source of inter tribal wars over territory. The First Rajah gained influence and authority by resolving such inter tribal wars over territory and suppressing piracy. Since the only direct limitation was introduced in 1933, there is no reason to say NCR over 'pulau Galau' cannot be acquired under NCR in 1909 or 1910 by the appellants' ancestors.

[90] Hence, while we agree that the limitations under s 66 of the Land Settlement Ordinance 1933 and s 5(2) of the Land Code (Sarawak Cap 81) accord roughly to the description of 'temuda' land, these limitations, for the reasons stated above are of no application to NCR rights acquired in 1909 or 1910 which include Pulau Ramu or Pulau Galau as part of the *pemakai menoa* of a native settlement. This accords with common law that rights acquired previously cannot be taken away without compensation even by legislation (see *Superintendent of Lands & Surveys Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 (CA).

[91] We find the defence on law to be unfounded.

[92] The aerial photographs of 1947 and 1951, showed forest cover on the area claimed except for about 127 hectares. The other evidence placed on the balance of probabilities by the defence are the testimonies of DW1 Abdul Razak bin Morshidi and DW3 Saiful Izan bin Kassim. DW1 testified as to the making of recommendations for the issue of provisional leases where he would exclude areas which may be subject to NCR claims. The record of proceedings does not show he had gone on the ground to verify that the area recommended is not the subject of an adverse claim. DW3 on the other hand testified the areas

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under the provisional lease included the 127 hectares of area that appeared to be cleared areas under the 1947 and 1951 aerial photographs. A

[93] What is clear is that as to what is cleared area and not cleared area, the second and third respondents relied on 1947 and 1951 aerial photographs without verification on the ground as to whether what appears in the aerial photographs remained correct at the time of issue of the provisional lease, or even at the time of the issue of the timber licenses in 1966. We accept the timber licenses issued and operated upon indicated at least part of the area was forest covered, but which part remains unclear. In the light of PW2 testimony, part of the area was kept as 'Pulau Ramu' under forest cover explains why logging under a timber licence was possible. But without the records of timber extraction from the area being produced, it is not possible to draw any conclusion. B C

[94] We would, therefore, hold that the defence on facts to be not conclusive. D

[95] We bear in mind *Selvaduray v Chinniah* [1939] 8 MLJ 253 (CA), where at p 256, the then Court of Appeal held that although the establishment of the defendant's version would necessarily be conclusive against the plaintiff, a failure to establish it is by no means conclusive in the plaintiffs favour. The plaintiff must prove his case and it is sufficient for the defendant if the plaintiff fails to do so. We address ourselves to what was put on the balance of probabilities by the appellants. E F

[96] The evidence placed upon the balance of probabilities by the appellants were adequately addressed in our examination of the reasoning by the High Court. We examined the weightages to be given in order to come to a conclusion in which direction the balance of probabilities tilt. G

[97] Both claims were based on occupation sometime 1909 or 1910. There is no evidence from the respondents to contradict that if the testimonies of the appellants' witnesses were accepted. But if the NCR rights were acquired by their ancestors in those years, then Pulau Galau remained a valid part of the claims. H

[98] At the trial, the respondents primarily sought to discredit the testimony of the appellants' witnesses. As we have demonstrated earlier, the appellants' claims were dismissed for the wrong reasons, and not specifically because the testimony of the appellants were rejected for showing concern only about their own needs or interests, in disregard of the truth or the interests of others. I

[99] We do not however overlook, as did the High Court, the fact that PW1

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maintained his version that the claimed areas were cleared and cultivated, and that this part of his testimony contradicted that of PW2 who under cross-examination by counsel for the second and third respondents at RR 2(1) Part B p 146:

Q: Am 1 correct to say that the other claimants claiming to have acquired NCR over the purported area claimed by them is because they alleged that their ancestors had cultivated or farmed in those areas claimed by them respectively?

A: Yes I agree.

Q: Do you agree that the areas claimed by you and the other claimants would have been cleared by your or their ancestors in 1909?

A: Yes I agree but not the whole areas were cleared. By our custom there must be 'pulau ramu' as in Iban it is called 'pemakai menod'.

[100] Counsel who had carefully cross-examined PW1 that their ancestors cleared all of the land, appeared to accept this answer by PW2 and moved on to cross-examine PW2 at which Native Court PW2 had presided. Much later, after adjournments, it was put to him that in fact in 1947 and in 1951 the area claimed were still virgin jungle, he had replied that he himself did not know but he only heard stories from the elders that this area had been cleared and cultivated. Later in the cross-examination, at RR 2(1) Part B, p 183, it was put to him that the land the plaintiffs' claim as late as 1966 was a forest, there could not have been any cultivation carried on by the plaintiffs or their ancestors, he disagreed 'because before 1958 we were already cultivated the fruit trees.' The next put question was 'That is only what you were told.' And he replied 'Yes.'

[101] The appellants did not claim total clearing for cultivation in the pleadings:

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Particulars

(i) The area claimed by the plaintiffs totalled approximately 2915.78 acres.

(ii) The plaintiffs' inherited and/or acquired the said NCR from their parents and/or grandparents and/or ancestors who had been living off the said Lands since their first occupation of the said Lands in and around the year 1909 or there about.

(iii) The said Land had been cultivated and/or occupied uninterrupted since the plaintiffs' ancestors first cultivated and/or occupied the said Lands in the year 1909 or there about.

(iv) The said Lands are planted with fruit trees and other crops to sustain the livelihood of the plaintiffs.

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(v) The plaintiffs and their parents and great grandparents are closely and inextricably bound to their said Lands and forests from which they obtain their livelihood. The said Lands are their source of food and livelihood and still are.

[102] Studying the examination, cross-examination and re-examination, we concluded the failure to clarify which part was maintained as 'Pulau Ramu' and which part was cleared, cultivated and planted with trees left the witnesses with the basic testimony for the acquisition of the NCR right, that there was clearing and planting, overlooking the custom of 'Pulau Ramu'. This, in our view, is the cause of the discrepancy, made worse by the fact the forest had been logged and the case depended on memories of what they were told, and from not any inherent unreliability or untruthfulness on their part to safely warrant rejecting their testimony. Other parts of their testimonies were consistent. They had testified they were the descendants of the original occupiers in 1909 or 1910 from whom they inherited the lands. They resided nearby and explained why they did so. Their testimonies, although containing some discrepancies, were not contradicted by any evidence. Indeed, the defence approach was only to challenge the appellants to produce evidence and then to try to discredit the evidence.

[103] A realistic approach must recognise that: (a) unvarnished, unrehearsed truthful testimony will always contain discrepancies and uncertainties, and (b) not every such failing is necessarily evidence of fabrication and therefore untruthfulness. We note that the High Court itself did not find them to be untruthful witnesses. The High Court gave reasons why it doubted their testimony, and we have demonstrated above, erred in its reasoning.

[104] We hold that given that the claim is based upon occupation in 1909 or 1910, with no direct witnesses alive to testify for the appellants, it is unrealistic to expect complete, crystal clear and precise evidence as in mathematical or scientific proof. The discrepancies and uncertainties in the appellants evidence are inherent in NCR claims based upon ancestral occupation. There is no reason demonstrated by evidence or brought out in cross-examination that his claim and those he represents are not in accordance with law, and their facts and evidence are not bona fide or are untrue. Even the government of the state and its departments charged with jurisdiction over forests and land, had no precise evidence either. The timber license and provisional leases issued were subject to survey, implicitly acknowledging that the areas issued could be the subject of adverse claims. In the circumstances, we are irresistibly led to the conclusion that the appellants had as plaintiffs successfully proved their case upon a balance of probabilities and that the second and third respondents as defendants had failed to establish its defence on law.

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[105] The primary orders sought by the appellants would result in loss suffered by the first respondent. In their defence, the second and third respondents had made no case against the first respondent for encroaching upon land with adverse claims. Nor did the first respondent make any claim against the second and third respondents. The issues, however, pertain directly to the issuance by the second and third respondents of the provisional leases to the first respondent. The second and third respondents, therefore, bears the entire responsibility when the appellants' appeals succeed.

[106] PW1 had testified, at RR 2(1) Part B, p 95, that NCR can be transferred to another person or another native who may not be a Kedayan by race but a native of Sarawak. It was put to him that NCR in fact cannot be transferred to other native or other person who is not from the same race in the same community. He disagreed.

[107] The question whether an NCR right can be transferred depends entirely upon the custom of the community. Such custom is after all for the safety of and good order in the community. We adopt the approach in *Hamit bin Matusin & Anor v Superintendent of Land & Surveys & Anor* [1991] 2 CLJ 1524 that an elder in a community may testify and if no evidence is adduced to rebut his testimony, then his testimony that NCR can be transferred can be accepted as being evidence that the custom is so in that community.

[108] We noted though the question was put to PW1, no evidence was adduced by the respondents to contradict PW1 and support the view that NCR cannot be transferred. Now PW1 is 70 years old. He is the *Pemanca*. Before that he had been *Penghulu*. In our view, he is well qualified and we accept his testimony that NCR could be transferred to another person or another native who may not be a Kedayan by race but a native of Sarawak.

[109] Accordingly, we allow the appeals, set aside the order of dismissal by the High Court and enter judgment for the appellants:

(a) that the second and third respondents do pay compensation as damages to be assessed before the deputy registrar, to the plaintiffs in each civil suit for their respective parcels of land as identified in the respective statement of claims;

(b) that the second and third respondents pay costs, unless otherwise agreed, in the sum of RM40,000 here and below for each appeal and civil suit; and

(c) no order in respect of the first respondent.

Appeals allowed, the High Court's decision set aside and, inter alia, second and

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third respondents ordered to pay damages, as assessed by deputy registrar, to appellants.

Reported by Ashok Kumar